

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of REGINA T. PELLECCIA and U.S. POSTAL SERVICE,  
POST OFFICE, Boston, MA

*Docket No. 00-658; Submitted on the Record;  
Issued October 11, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective August 19, 1998.

On September 9, 1992 appellant, then a 47-year-old postal clerk, filed a claim for tendinitis of the right elbow. She attributed her condition to repetitive lifting motion in dispatching express mail. Appellant stopped working as of August 21, 1992. The Office accepted appellant's claim for epicondylitis of the right elbow and paid appropriate compensation. Appellant underwent surgery of her right elbow on May 24, 1993. Appellant returned to work for four hours a day on November 20 to December 9, 1993 and then went off on maternity leave. She returned to work on May 6, 1994, working four hours a day through December 21, 1994. Appellant sustained a recurrence of disability on December 22, 1994 and returned part time to work on February 12, 1995. Appellant stopped working on or about May 7, 1996.

Drs. Daniel Bienkowski and Lewis Millender, both orthopedic surgeons, initially treated appellant following her injury. Dr. Walter Panis, a Board-certified neurologist, commenced treatment of appellant in July 1996. Dr. Panis submitted several reports, in which he addressed appellant's continuing right elbow symptoms and noted the onset of left elbow symptoms.

On February 6, 1998 the Office referred appellant to Dr. Gordon F. Lupien, a Board-certified orthopedic surgeon, for a second opinion medical evaluation. In a March 7, 1998 report, Dr. Lupien reviewed appellant's history of injury and medical treatment of the right elbow, including a May 24, 1993 epicondylar release. He noted that appellant was followed after surgery and released to return to part-time work. Dr. Lupien indicated that appellant began to have complaints of epicondylitis in her left elbow and reported a history of a March 29, 1996 motor vehicle accident, for which she was followed with complaints of neck pain and vertigo. She related a history of prior carpal tunnel release bilaterally, on the left in 1978 and on the right in 1987. Dr. Lupien related his findings on physical examination, noting a scar over the lateral aspect of the right elbow. He reported deep tendon reflexes, muscle power and sensations were

intact; voluntary neck motion full; and examination of the upper extremities to be unremarkable. Ranges of elbow motions were reported as full and symmetrical, with no muscle weakness or atrophy present. Dr. Lupien stated that appellant's physical examination revealed no objective evidence of any physical impairment or loss of physical function. He opined that the available medical reports revealed an inconsistent clinical picture, which was not typical in patients with epicondylitis and that appellant had subjective complaints which were not manifestations of an anatomical lesion. Dr. Lupien concluded that appellant was capable of returning to her regular duties as a mail clerk.

In a June 16, 1998 notice, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that she was no longer disabled due to residuals of her accepted condition.

Appellant submitted a June 22, 1998 report from Dr. Panis, who noted that appellant brought the consultation report of Dr. Lupien for review. He stated that appellant reported pain to the right elbow during daily living activities and that the regular duties of a mail clerk required carrying maximum loads of 70 pounds. Dr. Panis stated that, on examination, appellant's surgical scar was nontender and she exhibited pain with resisted extension, with give and take weakness over the right wrist. He found no evidence of atrophy. Dr. Panis opined that appellant could return to work, but for only four hours a day with maximum lifting restricted to 20 pounds.

By decision dated August 19, 1998, the Office terminated appellant's compensation on the grounds that the weight of medical opinion, as represented by Dr. Lupien, established that residuals due to her accepted right elbow condition had ceased and she was capable of returning to full-time regular duty.

Appellant, through her attorney, requested a hearing before an Office hearing representative that was held on July 20, 1999. Prior to the hearing, counsel submitted a Freedom of Information Act request to the Office concerning the number of times Dr. Lupien had performed second opinion or impartial medical examinations. Counsel also requested that the Office submit the concluding paragraphs from the medical reports submitted from him. The Office furnished information, noting that Dr. Lupien had performed approximately 50 second opinion examinations and three impartial medical opinions. Counsel subsequently contended that review of the concluding paragraphs written by Dr. Lupien indicated he found no objective evidence of disability in 39 examinations. Counsel contended that "such routine conclusions from Dr. Lupien are hardly even-handed and judicious but rather biased against claimants." He requested that the Office set aside the August 19, 1998 decision.

At the hearing, appellant's attorney submitted a June 18, 1998 report of Dr. Panis to the record. Dr. Panis stated that he first treated appellant on July 29, 1996 and reviewed her history of injury and medical treatment. By 1995, appellant's former physician had noted a question of symptoms developing in her left elbow consistent with epicondylitis. When first treated, Dr. Panis found pain over both the right and left epicondyles and had appellant restrict her elbow movements. He reported that appellant was involved in a rear-impact motor vehicle accident on March 29, 1996, which caused symptoms of vertigo. In September 1996, Dr. Panis felt that appellant had a chronic pain syndrome and she was enrolled in a program. In February 1997, she reported pain over the lateral epicondyles, more on the right side than the left. He reviewed

Dr. Lupien's report. Dr. Panis noted findings on physical examination, including pain to palpation over both lateral epicondyles, resisted motion of the wrists with full passive range of motion of both shoulders. He described appellant's condition as chronic and recommended continuing lifting restrictions that he attributed to her employment injury. Dr. Panis noted appellant could return to work within lifting restrictions for four hours a day but she remained disabled for work due to restrictions related to vertigo, a nonemployment-related condition.

In a September 30, 1999 decision, the Office hearing representative affirmed the August 19, 1998 decision. He found that Dr. Lupien's report constituted the weight of medical opinion and established appellant's accepted employment-related disability had ceased. The hearing representative also found that the evidence of record did not establish bias on the part of Dr. Lupien towards appellant.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits due to a conflict in medical opinion.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>1</sup> The Office did not sustain its burden of proof in this case as the medical evidence of record demonstrates a conflict of medical opinion.

The conflict of medical opinion exists between appellant's physician, Dr. Panis and the Office referral physician, Dr. Lupien, on the issue of the nature and extent of any residual disability related to appellant's accepted condition of right elbow epicondylitis.<sup>2</sup>

Dr. Panis provided reports, in which he noted that appellant had continuing pain symptoms over the lateral epicondyle bilaterally, more so on the right. He concluded from appellant's history of continued pain symptoms that she had developed a chronic pain condition that persisted even after she stopped working because she continued to use her arms in the activities of daily living. Dr. Panis stated his belief that appellant made a full effort in his examination, contrary to the impression Dr. Lupien drew from his physical evaluation. Dr. Panis opined that residuals of appellant's accepted injury remained and he restricted appellant to part-time duty with lifting restrictions. Dr. Lupien, however, examined appellant and opined that there were no objective physical findings to demonstrate residual physical impairment or loss of function. He stated that a review of appellant's medical records revealed an inconsistent clinical picture, not typical of patients with epicondylitis and that her physical complaints were not a manifestation of any anatomical lesion. Dr. Lupien found that appellant was capable of returning to her regular duties without any physical limitations or restrictions. Since a conflict in the

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<sup>1</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>2</sup> Section 8123(a) of the Federal Employees' Compensation Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. See *Charles E. Burke*, 47 ECAB 185 (1995).

medical evidence exists, the Office did not meet its burden of proof to terminate appellant's compensation.<sup>3</sup>

The September 30, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
October 11, 2001

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>3</sup> The Board notes that, on appeal, counsel for appellant has not raised the allegations of bias which were presented to the hearing representative. If a claimant believes or has reason to believe that a referral physician would be or has been biased in his or her examination, this fact must be taken into consideration by the Office, together with all surrounding circumstances in determining whether it would be judicious to employ the services or report of the questioned physician. In the absence of such a showing of bias, the Office must be free to request medical opinions as allowed by statute. In this case, there is insufficient evidence contained in the record of any actual bias or unfairness on the part of Dr. Lupien. *See Anthony La-Grutta*, 37 ECAB 602 (1986).